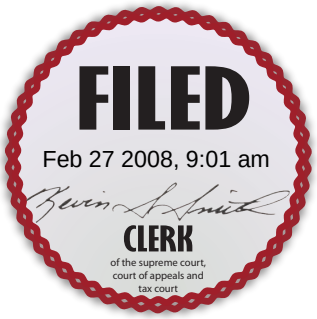


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| DENNIS C. FOX, II, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 02A03-0708-CR-414 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0611-FB-223

**February 27, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Dennis C. Fox II appeals his conviction of Rape,[1] a class B felony, and Criminal Confinement,[2] a class D felony. Fox presents the following restated issues for review:

1. Did the trial court err in admitting Fox's statement into evidence?

2. Did the trial court err in limiting the scope of a defense expert witness?

3. Was the evidence sufficient to support the convictions?

We affirm.

The facts favorable to the convictions are that at about 9:00 p.m. on October 21, 2006, twenty-two-year-old S.H. went to a Warsaw, Indiana nightclub with her friend Jessica, where they joined a group of girls. S.H. began drinking alcohol and dancing in a cage that was inside the nightclub. S.H. was so intoxicated by that time that she later remembered dancing in the cage, but not leaving it. In any event, S.H. met Fox in the cage and the two danced together there. Jessica saw S.H. and Fox groping and kissing each other. Paul Hicks, an acquaintance of Fox's, described S.H. and Fox as "pretty much all over each other." *Transcript* at 365. Jessica asked S.H. to come with her, but S.H. declined and instead left the cage, hand-in-hand, with Fox. At about 2:00 or 2:30 a.m., Robert Rinearson, the driver of the nightclub's shuttle van, saw Fox carrying S.H. from the nightclub "almost like a groom carrying a bride across the threshold." *Id*. at 405. When Fox placed her in the van, Rinearson observed that S.H. was "completely

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[1] Ind. Code Ann. § 35-42-4-1 (West, PREMISE through 2007 1st Regular Sess.).

[2] I.C. § 35-42-3-3 (West, PREMISE through 2007 1st Regular Sess.).

passed out." *Id*. at 407. As soon as Rinearson pulled out of the parking lot, S.H. vomited. Although another female passenger in the van repeatedly asked S.H. if she was all right, Rinearson heard no response from S.H. When Rinearson stopped to drop off the other female passenger, he observed that S.H. had thrown up "all over herself." *Id*. at 413. The other female passenger retrieved a towel from her apartment and brought it to the van, but when she attempted to help clean up S.H., Fox said, "No, she's all right. She's all right." *Id*. at 413-14. While the other passengers cleaned her and the van, S.H. remained "completely incoherent." *Id*. at 415.

When the van arrived at the destination Fox had provided, a hotel, Rinearson helped Fox get S.H. out of the vehicle. At that point, S.H. was still "limp." *Id*. at 419. Rinearson cleaned more of the vomit out of the van and when he was done, he saw S.H. slumped over on the ground on her knees, with Fox attempting to pull her to her feet. Rinearson asked if he could help and Fox responded, "No, no. I got her. I'll take care of it." *Id*. at 420. It was at about that time that S.H. said the only thing Rinearson heard her say, which was, "No, leave me alone. I don't want to go." *Id*. When Rinearson drove away, S.H. was still not on her feet.

The last memory S.H. had of her time at the nightclub was dancing in the cage. The next thing she remembered was waking up somewhere outside – she did not know where – dressed only in a tank top and sweat pants. In fact, she was outside of Fox's hotel and her clothes were in a trash bag beside her, covered with vomit. She borrowed a cell phone and called Jessica's boyfriend, Brian, and told him she did not know where

she was and asked him to come pick her up. Soon thereafter, at approximately 4:30 a.m., her boyfriend Nate arrived with Jessica and Brian and picked her up.

S.H. slept alone on the couch at Nate's house and went home after she awoke. She called Jessica and asked her what happened the previous night and then talked to her parents. After speaking with her parents, S.H. went to a hospital in Warsaw, which referred her to the Fort Wayne Sexual Assault Treatment Center (the Treatment Center). S.H. drove to the Treatment Center at approximately 6:00 p.m. on October 22 and spoke with a detective and a nurse. She reported that she had not showered since the previous morning and was still wearing the same underwear. A physical examination revealed no injuries. Several samples were collected for testing, including blood, a vaginal wash, and swabs from S.H.'s vagina, cervix, rectum, and underwear. Although S.H. did not remember engaging in sexual intercourse on October 21 or 22, the tests revealed the presence of semen on S.H.'s external genital swab, rectal swab, and underwear. The tests also indicated the presence of p30 protein, which is secreted by a prostrate gland. No sperm was found in any of the aforementioned samples, which is consistent with a semen contributor who had undergone a vasectomy. The only DNA present at those sites was consistent with S.H.'s DNA. Swabs taken from her breasts and neck, however, indicated a second DNA contributor.

On October 26, 2006, Fox went to the Fort Wayne Police Station to make a statement in connection with the ensuing investigation. He initially denied having intercourse with S.H. He claimed they had just touched each other without undressing

until S.H. vomited. He claimed he then helped S.H. shower (while he remained dressed) and provided her with sweatpants to wear because she had vomited on her jeans. Eventually, however, Fox admitted that the two had sex, which he claimed was consensual, before S.H. vomited. He also informed the police that he had previously undergone a vasectomy.

On November 1, 2006, Fox was charged with rape as a class B felony and criminal confinement as a class D felony. Fox was found guilty as charged following a jury trial.

1.

Fox contends the trial court erred in admitting his statement to police detectives that he had sexual intercourse with S.H. We note that in this case, Fox admitted he had sexual intercourse with S.H., but did not admit he raped her, inasmuch as he claimed the intercourse was consensual. Under these circumstances, however, that admission from a strictly evidentiary perspective may be treated as a confession. Fox objected to admission of the statement/confession on grounds that there was no corpus delicti. Fox makes the same argument upon appeal, i.e., that the State must establish the corpus delicti of the crime charged by providing probative evidence other than the confession in order to render the confession admissible into evidence. *See Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003).

Trial courts enjoy broad discretion in ruling upon the admissibility of evidence. *Griffith v. State*, 788 N.E.2d 835 (Ind. 2003). Such rulings will be disturbed only upon a finding of abuse of discretion. *Id*. When reviewing evidentiary decisions, we view the

circumstances in their totality and determine whether there was substantial evidence of probative value to support the trial court's ruling. *Id*. We consider unconflicting evidence along with conflicting evidence most favorable to the trial court's ruling, and do not reweigh the evidence in the process. *Id*. A crime may not be proved solely on the basis of a confession. *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998), *cert. denied*, 527 U.S. 1035 (1999).

In Indiana, in order to support the introduction of a confession into evidence, the corpus delicti of the crime must be established by independent evidence of both (1) the occurrence of the specific kind of injury and (2) that someone's criminal act was the cause of the injury. *Id*. This evidence need not prove beyond a reasonable doubt that a crime was committed, but merely "'provide an inference that a crime was committed.'" *Workman v. State*, 716 N.E.2d 445, 447-48 (Ind. 1999) (quoting *Stevens v. State*, 691 N.E.2d 412, 425 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)). That inference may be established through circumstantial evidence. *Shanabarger v. State*, 798 N.E.2d 210 (Ind. Ct. App. 2003), *trans. denied*.

Several witnesses testified that S.H. was very intoxicated when she left the nightclub with Fox in the early morning hours of October 22. Shuttle driver Rinearson testified that S.H. was incoherent and essentially passed out when he picked up her and Fox from the nightclub and drove them to Fox's hotel. Hicks testified that Fox later called him and told him that S.H. was lying naked and passed out on the bed in Fox's hotel room. S.H. testified that she regained consciousness while standing outside of that

hotel and had no memory of being in Fox's room. She claimed to have no memory of engaging in sexual intercourse with anyone. Yet, tests conducted later that day revealed the presence on S.H.'s vagina, rectum, and underwear of semen that was consistent with a donor who had undergone a vasectomy. Fox admitted he had undergone a vasectomy. At the time the tests were conducted in the early evening hours of October 22, S.H. had not showered or changed her underwear since the previous morning, i.e., October 21.

Rape as a class B felony is defined as follows:

> [A] person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:
>
> (1) the other person is compelled by force or imminent threat of force;
>
> (2) the other person is unaware that the sexual intercourse is occurring; or
>
> (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given; commits rape, a Class B felony.

I.C. § 35-42-4-1(a). The evidence recited above permits an inference that Fox had sexual intercourse with S.H. at a time when she was unable to consent because of her extreme intoxication and thus was sufficient to provide an inference that the crime of rape as defined in subsections (a)(2) and (a)(3) above was committed. *See Workman v. State*, 716 N.E.2d 445. Therefore, the trial court did not err in admitting the confession on the basis of a lack of corpus delicti.

2.

Fox contends the trial court erred in limiting the scope of direct examination of a defense expert witness. Dr. Richard Ofshe is a psychologist who was called as an expert

witness by the defense on the subjects of false confessions and the coercive effects of police interrogations. Defense counsel was permitted to question Dr. Ofshe generally about coerced confessions, but not to ask questions about this particular case. Fox contends the trial court erred in so limiting the scope of his expert witness's testimony. We reiterate that trial courts enjoy broad discretion in ruling upon the admissibility of evidence and such rulings will be reviewed only for an abuse of discretion. *Griffith v. State*, 788 N.E.2d 835.

Our courts have addressed this general issue involving this particular expert witness in at least two previous cases. In *Callis v. State*, 684 N.E.2d 233 (Ind. Ct. App. 1997), *trans. denied*, the defense sought to utilize Dr. Ofshe's testimony about coercive police interrogation and the phenomenon of false or coerced confessions. The State did not object to Dr. Ofshe's expertise on the general subjects of coercive police interrogation and false or coerced confessions, but did object when Dr. Ofshe was asked his opinion about the interrogation process utilized in that particular case. The trial court sustained the State's objection on grounds that the proposed testimony violated Rule 704(b) of the Indiana Rules of Evidence, which provides, "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Callis appealed the trial court's ruling, arguing that the proffered testimony "merely concerned the reliability of the interrogation process, not the truthfulness of witnesses[.]" *Callis v. State*, 684 N.E.2d at 239. This court held that the trial court properly admitted Dr. Ofshe's testimony about

the phenomenon of coerced confessions, but also that it properly excluded Dr. Ofshe's opinions about Callis's interrogation. This was based upon our conclusion that the aim of Dr. Ofshe's excluded testimony was to express an opinion concerning who was telling the truth about Callis's statements, which is not admissible pursuant to Evid. R. 704(b).

Our Supreme Court addressed the matter several years later in *Miller v. State*, 770 N.E.2d 763 (Ind. 2002). In that case, Dr. Ofshe's testimony had been the subject of a State pre-trial motion in limine. The trial court preliminarily granted the motion but indicated it would reconsider the motion when the defense called Dr. Ofshe to testify, at which time the court would listen to Dr. Ofshe's proposed testimony outside the presence of the jury. When that time came, the defense questioned one of the interrogating officers about defendant Miller's interrogation and then called Dr. Ofshe to the stand and asked whether the officer's testimony "provided any characteristics … or phenomena of false confessions or police interrogation in your area of study[.]" *Id*. at 771 (internal citation omitted). Dr. Ofshe testified about specific tactics used during that interrogation. Ultimately, the trial court did not permit Dr. Ofshe to testify at all. The Supreme Court determined the decision to prohibit Dr. Ofshe from testifying altogether was erroneous. The Court stated, "We understand *Callis* to prohibit expert opinion testimony regarding the truth or falsity of one or more witnesses' testimony, but it does not generally prohibit expert testimony regarding police techniques used in a particular interrogation." *Id*. at 773. The Court further explained, "the general substance of Dr. Ofshe's testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation

and the interrogation of mentally retarded persons, topics outside common knowledge and experience." *Id*. at 774. Finally, the Court indicated that if portions of Dr. Ofshe's testimony "would have invaded Rule 704(b)'s prohibition of opinion testimony as to the truth or falsity of the defendant's statements, the trial court could have sustained individualized objections at trial." *Id*.

We conclude that *Miller* generally approved the holding in *Callis* that Dr. Ofshe, as well as other experts offering testimony similar to Dr. Ofshe's, may testify on the general subjects of coercive police interrogation and false or coerced confessions. The expert may not, however, comment about the specific interrogation in controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced. It is clear from the appellate materials that Dr. Ofshe's testimony in this case would not have been consistent with Evid. R. 704(b). We note in this respect Fox's offer to prove was presented in the form of an exhibit containing excerpts from Fox's interrogation. Selected comments of Fox and the interrogators were color-coded, with red designating the type of tactic used (e.g., red indicates "Development of the psychologically coercive motivator'), *The Exhibit Volume*, Defendant's Exhibit A at 1, and blue designating the purported effect upon Fox (e.g., blue and underlined equals "Mr. Fox's expressing his understanding that he his [sic] better off to agree that he had sex with [S.H.] even if he is not sure whether or not he did and Mr. Fox's report that the sex relations he had with with [sic] [S.H.] was consensual). *Id*. We presume the color-coding system reflects the essence of Dr. Ofshe's proposed testimony.

At a minimum, the blue-coded material violates Evid. R. 704(b). *See Callis v. State*, 684 N.E.2d 233.

Moreover, even if we were to conclude that the court erred in limiting Dr. Ofshe's testimony, the error is harmless. Dr. Ofshe was permitted to testify extensively about general police interrogation tactics and the typical possible effects of specific tactics upon those being interrogated. The jury was also permitted to view a videotape of Fox's entire interrogation. Therefore, the jurors were fully able to apply the concepts about which Dr. Ofshe testified to the interrogation that produced Fox's confession. This is all Dr. Ofshe's permissible testimony could have accomplished. There was no reversible error here.

3.

Fox contends the evidence was not sufficient to support the convictions.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Fox first contends the evidence was not sufficient to support the confinement conviction because "the State failed to prove that [he] knowingly or intentionally removed [S.H.] by fraud, enticement, force, or threat of force, from one (1) place to another," *Appellant's Brief* at 20, which is an element of that offense. *See* I.C. § 35-42-3-3(a)(2).

The evidence favorable to the conviction showed that Fox carried an unconscious S.H. from the nightclub to the shuttle van. After he dropped off Fox and S.H. at Fox's hotel, Rinearson saw S.H. kneeling on the ground and resisting Fox's attempts to move her from where she knelt, telling him, "No, leave me alone. I don't want to go." *Transcript* at 420. Thus, the evidence showed that S.H. was either unconscious or physically incapable of resisting Fox as he moved her from the nightclub to his hotel. This satisfies the requirements of I.C. § 35-42-3-3. In so holding, we reject Fox's argument that his actions in taking S.H. to his hotel room were reasonable because "[h]is only other option would have been to leave her outside" the nightclub. *Appellant's Brief* at 20. We note first that S.H. had friends at the bar who could have rendered assistance. Moreover, the evidence showed that S.H. had passed out by the time Fox put her on the shuttle bus. Under those circumstances, taking S.H. – who before that night was a complete stranger to him – to his hotel room was not the only reasonable alternative available to Fox. Among other things, Fox could have summoned aid from nightclub personnel or could have called for emergency medical assistance. On the facts of this

case, his claim that he took her to his hotel out of compassion for her and for her own benefit rings hollow.

Fox next contends the evidence was not sufficient to prove he committed rape. His first argument in support of this contention is based upon a claim we have already rejected, i.e., that the State failed to prove the corpus delicti of that offense. The second argument is, "the State failed to establish beyond a reasonable doubt that [S.H.] was unaware the sexual intercourse was occurring or that she was so mentally disabled or deficient that consent to sexual intercourse could not be given." *Appellant's Brief* at 20. In essence, Fox claims that S.H. may have in fact consented to sexual intercourse, but later could not remember doing so.

S.H. testified unequivocally that she did not agree to have sex with Fox. Rinearson testified that S.H. had passed out by the time Fox carried her to his shuttle bus and that she remained in that condition during the drive to Fox's hotel. She was, in Rinearson's words, "completely incoherent." *Transcript* at 415. To the extent S.H. regained consciousness at the time Rinearson dropped off her and Fox at the hotel, she resisted Fox's attempts to lift her from the kneeling position she had assumed and also indicated she did not want to go wherever it was he wanted to take her. S.H. remembered regaining awareness of her circumstances while standing outside the hotel, which occurred after she had been in Fox's room and had been undressed by him. She did not remember being carried from the nightclub by Fox to the shuttle, the shuttle ride, or anything that occurred inside Fox's hotel room. This testimony is sufficient to permit the

jury to infer that S.H. was not aware at the time that the act of sexual intercourse with Fox in his room was occurring and thus she did not give consent.

Finally, contrary to Fox's argument on appeal, the fact that S.H.'s mental incapacity was the result of alcohol intoxication does not render her temporary mental disability outside the contemplation of I.C. § 35-42-3-3(a)(2) and (a)(3) ("a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when … the other person is unaware that the sexual intercourse is occurring … or … is so mentally disabled or deficient that consent to sexual intercourse cannot be given … commits rape"). *See Glover v. State*, 760 N.E.2d 1120 (Ind. Ct. App. 2002), *trans. denied*. The evidence was sufficient to support the rape conviction.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.